(11) (9)

Nos. 96-552 & 96-553

In The

Supreme Court of the United States

October Term, 1996

RACHEL AGOSTINI, *et al.*,

Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF SARAH PETER, JOAN PETER, AARON WESTENDORP, KRISTA WESTENDORP AND DOUGLAS WESTENDORP IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Amici curiae Sarah Peter, Joan Peter, Aaron Westendorp, Krista Westendorp and Douglas Westendorp have sought the consent of the parties to participate in this matter by the filing of the enclosed brief. Consent letters from counsel for all parties to file this brief are on file with the Clerk in accordance with Rule 37.3, except that counsel for Respondents Felton, *et al.*, has withheld consent, necessitating this motion.

This motion and the enclosed brief are filed in support of the Petitioners Agostini, *et al.*, to inform the Court of the interests of children with acute disabilities resulting in special education needs and to show how the decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), has been applied by state and local governments and school officials to discriminatorily deny statutorily mandated special education services solely because the student with a disability attends a private *religious* school.

As set forth more fully in the "Interest of the Amici" section of the attached brief, *amici* are children with physical and cognitive disabilities that require special education assistance, and the parents of these children, who live in Minnesota. Under state law, the children, Aaron Westendorp (age 11) and Sarah Peter (age 5), are eligible for special education services, including the assistance of a paraprofessional aide in their regular classrooms. However, state and local authorities, relying on the *Aguilar* decision, refused to provide these services at the families' chosen private schools, because of the religious character of those schools. As a consequence, their parents have

been forced to remove Aaron and Sarah from their chosen religious schools and enroll them in public schools, in order to obtain the needed paraprofessional assistance.

The experience of *amici* under the Minnesota statutory and regulatory regime offers an important analytical complement to, and a unique perspective on, the issues presented by the pending case. In the instant case, New York City has sought to provide on-site remedial education services to needy students, without difference or discrimination based on the religious character, message, or viewpoint of a child's school, but the injunction in *Aguilar* bars them from doing so. Petitioners have sought review in order to be freed of this barrier. *Amici* are in a somewhat different situation. In *amici*'s case, the State of Minnesota, relying on *Aguilar*, has barred local school districts from providing paraprofessional classroom aides to students attending private religious schools. The Peter and Westendorp families, and others like them, have suffered the full brunt of *Aguilar*'s application, forcing them to choose between their constitutional right to pursue a religious education and their statutory rights to receive critically necessary and otherwise unavailable special education services.

From the perspective of *amici*, the question of whether *Aguilar* should be overruled thus involves more than simply the need to remove an impediment to the smooth and educationally sound operation of a beneficial government program; for Sarah Peter and Aaron Westendorp, *Aguilar* involves a question of *individual rights* – the right to freedom of religious choice, without government interference; and the right to receive statutory educational benefits designed to address one's disabilities,

without being discriminated against because of one's religious exercise, expression, or affiliation. *Amici* thus offer a unique and important perspective on the constitutional issues presented by the pending case.

Amici are particularly telling examples of the discrimination that has been suffered by students with disabilities who attend private religious schools in the wake of *Aguilar*. The *Aguilar* case has visited very real and harsh consequences in the lives of *amici* and others similarly situated – individuals who have had to bear other harsh burdens because of their disabilities.

Amici thus have a direct and important interest in the resolution of the instant case, and a valuable perspective to offer concerning the legal issues presented therein. *Amici* therefore respectfully urge that the Court grant this Motion for Leave to File a Brief *Amicus Curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether *Aguilar v. Felton*, 473 U.S. 402 (1985) should be overruled.

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INTEREST OF AMICI CURIAE

Amici are litigants in a case currently pending in the United States District Court for the District of Minnesota, *Peter, et al. v. Johnson, Commissioner, et al.*, No. 4-96-642, the resolution of which will be substantially affected by this Court's decision in the instant case. *Amici* are children who have physical and cognitive disabilities that require special education assistance, and the parents of these children.

Sarah Peter, age five, has Down Syndrome, resulting in physical and cognitive disabilities that require the presence of a paraprofessional aide to assist Sarah in her regular classroom. Her mother, Joan Peter, enrolled Sarah in the Noah's Ark Preschool, a Christian Preschool in Buffalo, a small town in central Minnesota. Mrs. Peter selected Noah's Ark because of her religious beliefs and her desire that these religious values be imparted to Sarah, and because Noah's Ark offered the best overall preschool program for Sarah's special needs. Mrs. Peter sought special education services for Sarah, to be provided at Noah's Ark, through her local school district, pursuant to state law.

Aaron Westendorp, age eleven, has very serious disabilities resulting from a brain stem lesion. Aaron is partially paralyzed from the eyes down, has spastic quadriparesis, breathes through a permanent tracheostomy, eats through a permanent gastrostomy tube, and is unable to speak. He has full cognitive functions and communicates through the use of finger spelling. Aaron's disabilities require the full-time presence of a paraprofessional classroom aide in his regular classroom to help in adapting classroom tasks to accommodate Aaron's physical disabilities, to attend to his personal care needs, and

to translate his finger spelling so that he can participate in regular classroom discussions and activities. Aaron's parents, Douglas and Krista Westendorp, enrolled Aaron in Calvin Christian School, a small Christian K-8 school in Edina, Minnesota, a suburb of Minneapolis. The Westendorps' two older daughters had attended Calvin Christian School. The family had chosen the school because of its excellent academic program, its Christian character and teaching, and their desire that the Westendorp children be taught in accordance with these religious values. Initially, the Westendorp family obtained private financial support for Aaron's special education needs through their church. When such support ceased to be available, the Westendorps were forced to withdraw Aaron from Calvin Christian School.

The State of Minnesota and the local public school districts in which these families reside refused to provide special education services to Sarah Peter and Aaron Westendorp, in the form of paraprofessional classroom assistants, so long as the children were attending religious private schools. Under state law, both Sarah and Aaron are entitled to special education services and have been determined to be entitled to the assistance of a paraprofessional classroom aide. State law provides that such services are to be furnished, when so indicated by the nature of the child's needs, on the premises of the child's regular school, including a nonpublic school, as long as such a private school "is not church related, is not controlled by a church, and does not promote a religious belief." Minn. Stat. § 123.932, subd. 3a, Minn. Rule 3525.1150, subp. 2. The effect of the Minnesota statutes and rules is that children with disabilities attending private *nonreligious* schools may receive special education

services at their schools, but children with disabilities attending private *religious* schools may not.

As a consequence of these state laws and rules (and the local school districts' implementation of them), neither Sarah Peter nor Aaron Westendorp could receive special education services at the religious schools selected by their parents. Joan Peter was forced to remove Sarah from Noah's Ark Christian Preschool and to enroll her in a public Head Start program in order to obtain the paraprofessional assistance necessary to her education. Similarly, Douglas and Krista Westendorp removed Aaron from Calvin Christian School and enrolled him in a public elementary school because they could not otherwise afford to pay for the paraprofessional assistance Aaron needs for his education.

The Minnesota state statutes and rules governing provision of special education services by local school districts – especially the definition of "neutral sites" at which such services may be provided – are designed to track this Court's holding in *Aguilar v. Felton*, 473 U.S. 402 (1985) and have been so explained in official policy statements of the State Attorney General's office. Memorandum of Assistant Attorney General Steven Liss (Exhibit G to Complaint in *Peter v. Johnson*, No. 4-96-642 (D.Minn.)). In defending the lawsuit brought by *amici*, the State of Minnesota has resisted the families' requests for declaratory and injunctive relief on the ground that *Aguilar* and *Grand Rapids v. Ball*, 473 U.S. 373 (1985) forbid the provision of paraprofessional assistants on the premises of a child's *religious* nonpublic school. The State contends that its implementing rules are mandated by *Aguilar* and require disparate treatment of children with disabilities based upon their attendance at a private religious (as

opposed to a private nonreligious) school. The State of Minnesota has sought to distinguish this Court's decision in *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S.Ct. 2462 (1993), on the ground that the nature of paraprofessional services differs from that of a sign-language interpreter, and that *Zobrest* did not overrule *Aguilar* and *Grand Rapids v. Ball*, 473 U.S. 373 (1985). *See* Memorandum of State Defendants in Opposition to Plaintiffs' Motion for Preliminary Injunction at 14 ("*Zobrest* did not extend to services beyond those provided by a sign-language interpreter who merely translates exactly what is said in class.").

Peter v. Johnson is currently awaiting decision on plaintiffs' motions for preliminary injunction and for partial summary judgment, and defendants' motions to dismiss. The motions were argued on November 8, 1996. Obviously, this Court's disposition of the pending case, *Agostini v. Felton*, Nos. 96-552 & 96-553, in particular its resolution of whether *Aguilar v. Felton* should be overruled, will have a direct and important effect on *amici* and the litigation in which they are parties. In addition, it is no exaggeration to say that the continued apparent authority of *Aguilar v. Felton* and *Grand Rapids v. Ball* has forced these children and their families to withdraw from their private religious schools in order to obtain special education services to which they are otherwise entitled as a matter of law. They may attend religious school only at the cost of abandoning special education benefits that they desperately need, and which their parents cannot otherwise afford to provide.

SUMMARY OF ARGUMENT

Aguilar v. Felton, 473 U.S. 402 (1985), was wrongly decided and should be overruled. The correct rule of decision in this case is supplied by this Court's decision in *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462, 2467 (1993) (citation omitted): "When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . provision of that service does not offend the Establishment Clause." *Aguilar v. Felton*, we submit, is irreconcilable in principle with this rule. A majority of the members of this Court has noted this conflict in subsequent cases. *See Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2498 (O'Connor, J., concurring in part and in the judgment); *id.* at 2505 (Kennedy, J., concurring in the judgment); *id.* at 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting). This case presents an appropriate occasion for resolving the conflict.

We submit that the *Zobrest* rule is the correct one. The Establishment Clause requires that government not coerce or induce religious exercise; that government's secular public programs be designed and administered in a religion-neutral manner; that government accommodations of religion be neutral as among religions and not impose substantial burdens on nonbelievers; and that government not itself engage in religious expression that endorses religion to such a degree as to impair the political standing or religious freedom of nonbelievers or believers in other faiths.

The decision in *Aguilar v. Felton* stands outside of – indeed, in some respects is *contrary* to – these general principles delineating the Court's Establishment Clause

jurisprudence. *Aguilar* depends on a rigid, uncompromising, and artificial "strict separation" that is unsupported by the history of the First Amendment and not required to prevent religious coercion, improper endorsement, or the burdening of nonbelievers. Moreover, *Aguilar*'s rule is not consistent with the principle of neutrality expressed in *Zobrest* and so many of the Court's other cases. Indeed, we submit that the rule expressed in *Aguilar v. Felton* - that a student attending a religious private school may not receive the benefit of education programs to which he or she is otherwise entitled if such programs would involve the presence of public school teachers at religious schools to carry out the program – affirmatively *violates* the neutrality principle. In short, *Aguilar*'s rule authorizes discrimination against religious exercise and the choice of religious education.

Amici's own situation illustrates the problem. Sarah Peter and Aaron Westendorp (and their parents) have been told that they may receive special education services only if they do not attend a private religious school. They have been put to a cruel choice: sacrifice their constitutional right to choose religious education (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *see Employment Division v. Smith*, 494 U.S. 872, 881 (1990)) or sacrifice their statutory right to receive crucial special education services. The dilemma for schoolchildren in the instant case is similar, if less severe: they may receive remedial education only if they are removed from their schools and made to travel, sometimes at great inconvenience, to public school sites. In principle, however, the situations are alike: individuals are deprived of a statutory benefit, or otherwise penalized in their ability to receive or make use of it,

because of the decision to pursue a religious education. *See Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting).

Such a result is surely not compelled by the First Amendment; indeed, we believe that such an outcome is affirmatively inconsistent with the First Amendment. As Justice O'Connor has put it: "The Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion. . . . If the government provides this [special] education on-site at public schools and at nonsectarian private schools, it is only fair that it provides it on-site at sectarian schools as well." *Kiryas Joel*, 114 S.Ct. at 2498 (O'Connor, J., concurring).

That is what this case is about: discrimination. Specifically, it is about whether the Establishment Clause requires discrimination against religion – against "religious ideas, religious people, or religious schools" in the context of secular government programs. *Kiryas Joel*, 114 S.Ct. at 2498 (O'Connor, J., concurring). We submit that such discrimination violates the Free Exercise and Free Speech clauses of the First Amendment. *Aguilar* needs to be overruled in order to bring the Court's Establishment Clause jurisprudence into line with the rest of its First Amendment jurisprudence.

Amici will make two broad points in this brief: First, the Establishment Clause, properly construed, does not *require* the rule of *Aguilar*. Second, the Free Speech and Free Exercise clauses *forbid* the rule of *Aguilar*. In making these points, we will highlight the analogous situation of *amici*, Sarah Peter and Aaron Westendorp, and show how

Aguilar punishes children and their families because of their religious exercise and choice of religious education.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT FORBID NEUTRAL PROVISION OF GOVERNMENT BENEFITS TO STUDENTS ATTENDING PRIVATE RELIGIOUS SCHOOLS, INCLUDING PROVISION OF ON-PREMISES SPECIAL OR REMEDIAL EDUCATION SERVICES.

The question presented by this case is whether the Establishment Clause requires some degree of discriminatory treatment of students attending religious schools, in order to preserve a degree of "separation" of church and state *not* dictated by the requirement of neutrality, *not* necessary to avoid government coercion of religion, and *not* required to avoid improper endorsement of religion. In doctrinal terms, the question is sometimes cast in terms of avoiding "excessive entanglement" between government and religion. *Aguilar*, 473 U.S. at 409-414 (1985); *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The question here is whether "entanglement" concerns legitimately may be used to invalidate *neutral* government policies, and thus require exclusion of religious persons or groups from the equal benefit of secular government programs.

Amici submit that such notions of "separation" and "entanglement" cannot properly be used to justify departures from neutrality – that is, discrimination against religion – in the administration of government programs. The Establishment Clause does not require such an extreme and insensitive result; moreover, such a result

would be at war with the rest of the First Amendment. Rather, where the requirement of neutrality is satisfied, and where the government program involves no coercion or special endorsement of religious activity, the Establishment Clause is satisfied. To the extent that *Aguilar* holds to the contrary – and affirmatively sanctions discrimination against religion – it should be disapproved.

A. The Establishment Clause Requires Government Neutrality, Noncoercion and Nonendorsement With Respect to Religious Exercise; It Does *Not* Authorize Discrimination Against Religion.

It is difficult (and perhaps undesirable) to attempt to reduce the Establishment Clause to a single judicial "test" or formula. *See Kiryas Joel*, 114 S.Ct. at 2498-99 (O'Connor, J., concurring). The rigid "*Lemon* test" has, in our view, rightly been discarded by a majority of the Court. *See id.* (O'Connor, J., concurring) (noting Court's abandonment of *Lemon* test); *see generally* Michael S. Paulsen, *"Lemon is Dead,"* 43 Case Western Res. L. Rev. 795 (1993). Nonetheless, certain general principles remain clearly marked out by this Court's cases and can be identified as setting forth the core governing principles of the Establishment Clause:

First, government must not coerce or induce religious exercise. *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Engel v. Vitale*, 370 U.S. 421 (1962).

Second, government's secular public programs must be designed and administered in a religion-neutral manner, so as to assure that they involve neither financial promotion of religion nor financial discrimination against religious individuals, groups, or speakers. *Rosenberger v.*

Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986); *see Bowen v. Kendrick*, 487 U.S. 589 (1988).

Third, governmental accommodations of religion must be reliably neutral among religions and not impose substantial burdens on nonbelievers. *Kiryas Joel*, 114 S.Ct. 2481; *Texas Monthly v. Bullock*, 489 U.S. 1, 27-29 (1989) (Blackmun, J., concurring); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring).

Fourth and finally, government must not itself engage in religious expression to such a degree as to impair the political standing or religious freedom of non-believers or believers in other faiths. *Compare, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) *with County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[1]

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[1] We recognize that this last principle identifies an area in which the Court has been intensely divided. *Compare Allegheny*, 492 U.S. at 614 (Blackmun, J.) (stating holding of the Court) (invalidating government display of a creche but not of a menorah) *with id.* at 645-55 (Brennan, J.) (creche display and menorah display both unconstitutional); *id.* at 663 (Kennedy, J.) (neither creche display nor menorah display unconstitutional).

We submit that the formulation set forth in the text is an accurate and useful restatement of the non-endorsement principle as expounded by members of this Court, despite differences that may exist as to its relevance or application to any particular case. The crucial operative features, in our view, are that it applies only to situations of government *speech* (literal or symbolic) and that it invalidates such expression only when it has or is likely to have the actual effect of interfering with persons' religious or political liberty. It does not apply merely because some individual might express a sense of subjective affront, no matter how unreasonable or idiosyncratic. *See Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J.,

These four touchstones fit together to form a coherent and unified whole: (i) noncoercion, (ii) neutrality in government's secular programs, (iii) neutrality (and noncoercion) in government accommodation of religion, and (iv) nonendorsement. This Court has noted that, at a minimum, the Establishment Clause forbids government compulsion of religious worship or exercise through means direct or indirect. *Lee v. Weisman*, 112 S.Ct. 2649 (1992). The noncoercion principle is reinforced by the requirement that government's public programs be operated in a manner that is *neutral* with respect to religion. Religion may be neither favored nor disfavored within such programs. Thus, a government program must neither be "skewed towards religion," *Zobrest*, 113 S.Ct. at 2467 (quoting *Witters v. Washington Dept. of Services for Blind*, 474 U.S. 481, 488 (1986)); *see Kendrick*, 487 U.S. at 608-609, nor impose special burdens or disabilities on persons or groups because of their religious status, affiliation, identity or expression. "State power is no more to be used so as to handicap religions, than it is to favor them." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

In this respect, the neutrality principle unites the Court's Establishment Clause, Free Exercise Clause, and Free Speech Clause jurisprudence. *See, e.g., Rosenberger,*

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concurring). But in situations where government speech actually impairs political and religious liberty, there is an actual departure from the core requirement of neutrality.

As we argue below, however, mere speculation concerning the possibility that some will perceive a "symbolic union" of religion and government merely from the fact of government's provision of a neutral, secular benefit, on equal terms, to religious beneficiaries, is surely not sufficient to identify a violation of the Establishment Clause. *See infra* at 16-17.

115 S.Ct. at 2517 (Free Speech Clause forbids exclusion from a government benefit on the basis of a person's or group's religious "premise," "perspective," or "standpoint"); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S.Ct. 2141 (1993) (Free Speech Clause forbids discrimination on basis of religious viewpoint or perspective); *Church of Lukumi Babalu Aye v. City of Hialeah*, 113 S.Ct. 2217, 2226 (1993) (unconstitutional to discriminate against religion or prohibit conduct only when engaged in for religious reasons); *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status.").[2]

The neutrality principle is, in a sense, an extension of the noncoercion principle, for the obvious reason that departures from neutrality – in either direction – will tend to have coercive effects on religious exercise. Favoritism or special financial support of religious exercise or affiliation, for example, will tend to induce such participation or affiliation, in order to gain the unique benefit. *Cf. Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (striking

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[2] *See also Widmar v. Vincent*, 454 U.S. 263 (1981) (unconstitutional to discriminate against religious speech in a limited public forum); *McDaniel v. Paty*, 435 U.S. 618 (1978) (unconstitutional for a State to exclude a minister from eligibility for public office on the basis of religious exercise, affiliation, or occupation); *id.* at 639 (Brennan, J., concurring in the judgment) ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."); *Everson*, 330 U.S. at 16 (government "cannot exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

down sales tax exemption exclusively for religious publications). Likewise, discrimination or special financial penalties attributable to religious exercise or affiliation will tend to discourage such participation or affiliation, in order to avoid the penalty. *Cf. Rosenberger*, 115 S.Ct. 2510; *see also Thomas v. Review Board*, 450 U.S. 707, 714-18 (1981) (financial penalty constitutes a "burden" on religious free exercise).

The requirements of noncoercion and neutrality carry over into a third area: accommodation of religion. It is well established that " 'government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause.' " *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-145 (1987)). Of course, where government seeks to accommodate religion, it is being specially cognizant of religion. This is different from other secular programs of government, in that the government's "secular interest" is one of furthering *religious* liberty. The requirements of neutrality and noncoercion play out slightly differently in this context. Government need not *disregard* religion; to the contrary, taking account of religious differences and unique needs is what accommodation is all about. But government may not *discriminate* among religions in making such accommodations. Indeed, this Court has struck down accommodations where there was insufficient assurance that accommodation would be granted to others in like circumstances. *Kiryas Joel*, 114 S.Ct. at 2493-94. Nor may government, in the guise of accommodation, impose such large, unequal burdens on nonbelievers as would constitute, in effect, an inducement or coercion to engage in the accommodated

religious practice. *Cf. Estate of Thornton*, 472 U.S. 703. In short, government accommodation of religion is permissible only when it is neutral among religions, facilitates religious practices independently adopted by their adherents rather than induces them, and does not amount to a transfer of resources or benefits from nonbelievers to believers in a manner unrelated to relieving genuine burdens on the free exercise of religion. *See generally* Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

The fourth principle, nonendorsement, has sometimes provoked division among the members of this Court. However, the nonendorsement principle can be seen as consistent with the notions of neutrality and noncoercion. "Nonendorsement" is the test applicable to government religious speech (including symbolic expression); that is, it applies where the government is *not* being neutral about religion, in order to test whether the effect of such government religious speech is, in essence, to coerce compliance with some government-sponsored notion of religious orthodoxy. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring). The nonendorsement principle's roots can be traced to the famous statement of Justice Jackson for the Court in *West Virginia State Board of Education v. Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943).

Government *prescription of religious orthodoxy* is the harm to be avoided in this context – not mere government speech that touches on religious themes or acknowledges the religious observances of the people. The relevant inquiry, we submit, is whether government has itself engaged in religious expression that endorses religion to such a degree as to impair the political standing or religious freedom of nonbelievers or believers in other faiths. *Cf. Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). Such an approach is consistent with *Barnette*'s condemnation of government prescription of orthodoxy generally, through its use of messages and symbols and through the use of state power to compel or induce adherence to such orthodoxy. So understood, the nonendorsement principle harmonizes with the other cornerstone principles of noncoercion, neutrality, and equal accommodation.

B. The Programs at Issue Here Satisfy the Establishment Clause's Core Requirements of Neutrality, Noncoercion, and Nonendorsement and Involve No Special Accommodation of Religion; *Aguilar v. Felton* Should Be Overruled on the Basis of the Rule Announced in *Zobrest v. Catalina Foothills School District*.

We think it plain that the Title I / Chapter I arrangements at issue in *Aguilar* and again today – and other programs like it – satisfy these four principles. There is no plausible claim that allowing remedial or special educational services to be provided on the premises of a religious school by public employees coerces religious exercise. The students' families independently chose religious education. *Zobrest*, 113 S.Ct. at 2469; *Witters*, 474 U.S. at 487. They receive no special "benefit" from being

eligible to receive secular services on the premises of their regular school of attendance; they receive only what other similarly situated needy students receive. *Equal inclusion* within a public benefit program cannot be thought "coercive."

It is equally plain that inclusion on equal terms is *neutral* and furthers the secular purpose of reaching disadvantaged students wherever they are – be it public school or religious or nonreligious private school – rather than imposing the additional cost and hardship of forcing these disadvantaged children to travel to public school premises. *See Aguilar*, 473 U.S. at 423-425 (O'Connor, J., dissenting). The neutrality of the program is especially evident where the program at issue supplements, rather than supplants, a private school's existing curriculum. *Id.* at 425-426. Under such circumstances, there can be no possibility that the program is really a disguised attempt affirmatively to sponsor, through preferential funding, religious instruction. Indeed, quite the contrary, the arrangement mandated by *Aguilar* has the consequence of *disfavoring* religious instruction by imposing unique penalties and burdens on families who choose it.

The program at issue is not an "accommodation" of religion in the sense of government voluntarily exempting some religious person or group from a rule of otherwise general applicability. The rule that the New York school board hopes to use is religion-blind: on-premises services for everyone who is eligible under strictly secular criteria.

Nor would such a practice constitute "endorsement" of religion. This is not a case of government embrace of a religious symbol, *cf. Allegheny, supra*, or government prescription as to the preferred use of a "Moment of Silence"

in public schools, *cf. Wallace v. Jaffree*, 472 U.S. 38 (1985). It is a case of a genuinely neutral government program. With respect, the "symbolic union" argument of the majority in *Grand Rapids v. Ball*, 473 U.S. 373 (1985), the companion case to *Aguilar*, is simply unpersuasive, and has not stood the test of time. Any suggestion that neutral provision of services constitutes an *actual* endorsement of religion is, of course, specious. The "symbolic union" argument thus reduces to the proposition that schoolchildren or other members of the public will *wrongly* view neutrality as sponsorship and that the Court should indulge the error and abandon neutrality in favor of actual discrimination against religion.

This Court emphatically rejected such an approach in *Board of Education v. Mergens*, finding that schoolchildren and the general public are able to understand that a policy of neutrality does not constitute sponsorship or endorsement of religion. 496 U.S. 226, 250 (1990). Just as a reasonable observer (including students) should understand "that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis," *id.* at 250, so too, a reasonable observer should be able to understand that equal access to a secular government education benefit or service does not constitute government sponsorship of religion. *Mergens*, we submit, highlights the error of the "symbolic union" analysis as applied in *Grand Rapids* and significantly undermines its authority as precedent.

The principles of neutrality, noncoercion, and nonendorsement thus all point in one direction: the rule of

Aguilar and *Grand Rapids* is not required by the Establishment Clause, nor is it consistent with the central animating principles this Court has embraced. The correct rule is as this Court stated it more recently in *Zobrest*:

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that 'is in no way skewed towards religion,' . . . provision of that service does not offend the Establishment Clause.

113 S.Ct. at 2467 (citation omitted).

That rule, we submit, controls this case. What is at issue here is a neutral, secular program providing a benefit to needy schoolchildren. Under the standards set forth in *Zobrest*, there is simply no serious Establishment Clause difficulty with neutral provision of remedial or special education services to eligible students attending religious schools, on the same basis as they would be provided to eligible students attending nonreligious private or public schools. The Establishment Clause forbids favored treatment of religion, not neutral treatment.

The rule of *Zobrest* compels repudiation of *Aguilar* and *Grand Rapids*. This Court held in *Zobrest* that neutral provision of benefits does not become unconstitutional merely because those benefits are provided on the premises of, or in connection with instruction at, a private religious school. *Aguilar* and *Grand Rapids*, distilled to their essence, hold exactly the opposite. They are inconsistent with the overriding Establishment Clause mandate of neutrality and equal treatment. They are also inconsistent with the Free Exercise Clause and Free Speech Clause requirements that persons engaged in religious exercise and expression not be discriminated against within government programs on the basis of that religious activity. *Rosenberger*, 115 S.Ct. 2510 (1995); *Lamb's*

Chapel, 113 S.Ct. 2141 (1993); *Lukumi*, 113 S.Ct. 2217 (1993). In short, the rule of *Aguilar* and *Grand Rapids* is, in principle, affirmatively inconsistent with this Court's subsequent decisions in *Zobrest*, *Rosenberger*, *Lamb's Chapel*, *Lukumi*, and *Witters* – and arguably inconsistent with other decisions as well.[3]

Under these circumstances, we submit, it is appropriate and important that *Aguilar* and *Grand Rapids* be formally abandoned. Lower courts and, even more frequently, government agencies, are continuing to operate on the assumption that *Aguilar* and *Grand Rapids* forbid them to provide on-site education benefit programs to children attending private religious schools, in effect excluding them from such benefits.

Amici's own situation is illustrative. Minnesota's Special Education statutes and regulations, as interpreted

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[3] Though the question was not specifically presented in *Kiryas Joel*, a majority of the members of the Court openly questioned the correctness and doubted the continued validity of *Aguilar* and *Grand Rapids*. *Board of Education of Kiryas Joel v. Grumet*, 114 S.Ct. 2481, 2498 (1994) (O'Connor, J., concurring in part and in the judgment) ("The Court should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track – government impartiality, not animosity, towards religion."); *id.* at 2505 (Kennedy, J., concurring in the judgment) ("The decisions in *Grand Rapids* and *Aguilar* may have been erroneous. In light of the case before us, and in the interest of sound elaboration of constitutional doctrine, it may be necessary for us to reconsider them. . . . *A neutral aid scheme, available to religious and nonreligious alike, is the preferable way to address problems such as the Satmar handicapped children have suffered.*") (emphasis added); *id.* at 2515 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("I heartily agree that these cases [*Grand Rapids* and *Aguilar*], so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity.").

and applied by state education officials, forbid on-site provision of paraprofessional classroom aides to students whose disabilities require such services, if the students attend a private religious school. These state statutes and regulations are binding on the local school districts that serve Aaron Westendorp and Sarah Peter. Accordingly, the school districts have refused to provide special education services at the religious schools chosen by the parents of these children. The State of Minnesota, and the respective local school districts, have sought to distinguish *Zobrest* on the ground that there exists a "critical distinction between a sign language interpreter and a paraprofessional/instructional aide." State Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, *Peter v. Johnson*, No. 4-96-642 (D. Minn. 1996) (decision pending). *Aguilar* and *Grand Rapids*, the government officials contend, control the latter situation.

Thus, Aaron Westendorp, an 11-year-old with severe paralysis through much of his body, is denied a paraprofessional because he needs a translator to interpret *his* communications (the exact reverse of the situation in *Zobrest*) and to adapt classroom tasks to accommodate his disability. This, the government officials and lawyers say, starts to stray too close to an "instructional" activity, and so is banned by *Aguilar*. Sarah Peter, a five-year-old with Down Syndrome, requires, because of her physical and cognitive disabilities, a paraprofessional to help her participate in her regular preschool program. This too, officials say, comes too close to "instruction." *Aguilar* has thus produced a bright-line rule that Sarah Peter may not receive a paraprofessional if her preschool program at Noah's Ark Preschool includes Bible stories – including,

of course, the story of Noah's Ark – or a prayer before the morning snack. *But see Hartmann v. Stone*, 68 F.3d 983 (6th Cir. 1995) (invalidating U.S. Army regulation prohibiting such religious activities during day care conducted in program providers' homes on base).

To be sure, the distinctions drawn by the Minnesota government officials in these cases are insensible and insensitive; they are doubtless wrong even under the *Aguilar* regime. But our point here is more fundamental: The continued existence of *Aguilar* and *Grand Rapids* as precedents *makes it both possible and inevitable for school officials to draw exactly such distinctions and devise such misguided bright-line prophylactic rules, with the result that children with disabilities or other special needs, whose families have chosen religious education, are discriminated against on the basis of that choice.*

We urge this Court to reaffirm that the Establishment Clause forbids government coercion of religious exercise, forbids selective endorsement of religion to such a degree as to impair the exercise of political or religious liberty, forbids preferential accommodations, and in general requires government *neutrality* toward religion. *See Kiryas Joel*, 114 S.Ct. at 2505 (Kennedy, J., concurring in the judgment). We simultaneously urge the Court to reiterate and emphasize that the Establishment Clause does not authorize or require any form of discrimination against religion, including rules that punish religious practice by imposing special disabilities on eligibility to participate in secular government programs. With respect, we submit that as long as *Aguilar* and *Grand Rapids* stand as

unreversed precedents of this Court, that message will not be clear.[4]

II. THE RULE OF *AGUILAR v. FELTON* VIOLATES THE FREE SPEECH CLAUSE AND THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Our final point is implicit in much of what we have already said: The rule of *Aguilar* is not only an unsound

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[4] Relatedly, as a doctrinal matter, we urge this Court to formally abandon "excessive entanglement" – the linchpin of *Aguilar* – as an independent test under the Establishment Clause. As noted above, the test as formulated in *Lemon* is incompatible with the rest of Establishment Clause analysis and its application frequently contradicts basic principles of the Free Exercise and Free Speech clauses. In our view, "entanglement" concerns properly belong on the free exercise side of the coin: "[E]xcessive entanglement of the state with religion is a form of burden on free religious exercise, abridging the liberty of the person or institution 'entangled' with, not a means of coercing, promoting, or even endorsing religion." Paulsen, *Lemon is Dead*, *supra*, 43 Case Western L. Rev. at 809.

A majority of the Court has long criticized the entanglement prong of *Lemon* as unsound in principle and unworkable in practice, *see Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988) (collecting cases), and the Court as a whole has not applied the entanglement test to invalidate government action in any case since *Aguilar*. *See Rosenberger*, 115 S.Ct. 2510 (1995); *Capitol Square Review and Advisory Board v. Pinette*, 115 S.Ct. 2440 (1995); *Kiryas Joel*, 114 S.Ct. 2481 (1994); *Zobrest*, 113 S.Ct. 2462 (1993); *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Mergens*, 496 U.S. 226 (1990); *Allegheny*, 492 U.S. 573 (1989); *cf. Lamb's Chapel*, 113 S.Ct. 2141 (1993) (noting test *arguendo* and rejecting its applicability). *See generally* Paulsen, *Lemon is Dead*, *supra*, 43 Case Western L. Rev. at 808-819 (1993) (noting decline and abandonment of *Lemon* test and ascent of noncoercion and neutrality as the central norms of Establishment Clause jurisprudence).

interpretation of the Establishment Clause, but one that affirmatively violates the Free Exercise and Free Speech clauses. If a state legislature of its own accord enacted a statute providing that education benefits or services should be open to all on an equal basis *except* those attending religious schools (who are disqualified or subjected to onerous burdens making their participation difficult or impossible), we have no doubt that this Court would strike it down as a core violation of the First Amendment. This, we believe, is the clear lesson of this Court's decisions in *Rosenberger*, 115 S.Ct. 2510 (1993), *Lamb's Chapel*, 113 S.Ct. 2141 (1993), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *McDaniel v. Paty*, 435 U.S. 618 (1978).

The same principle should apply where the government action in question is a judicial decision rather than a statute. In this sense, *Aguilar* itself violates the First Amendment. We offer two brief points in elaboration: First, government policies or actions that exclude or discriminate against persons or groups on the basis of religious expression, affiliation, viewpoint, or identity violate the Free Speech Clause. Second, government policies or actions that exclude or discriminate against persons or groups on the basis of religious exercise, affiliation, identity, or motivation likewise violate the Free Exercise Clause. *Aguilar* and *Grand Rapids* violate both principles.

A. The Free Speech Clause Forbids Discrimination in Access to a Government Program or Benefit on the Basis of the Religious Content or Viewpoint of Expressive Activity.

Few propositions are more central to the First Amendment than the proposition that, in the absence of

compelling justification, government must not discriminate against or deny a benefit to a person because of the content of his speech or expression. This Court has made clear that content-based discrimination against speech is "presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992). This includes government policies that exclude persons or groups from benefit programs or that make it more difficult or burdensome to participate in such programs, on the basis of the content of their speech or expressive conduct – including the expression of *religious* views and ideas. *Rosenberger*, 115 S.Ct. at 2516; *Lamb's Chapel*, 114 S.Ct. at 2147-48 ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (original quotation marks and citations omitted).

The rule of *Aguilar* violates these principles. *Aguilar* holds that government may provide secular remedial education services on the premises of public schools or non-religious private schools, but is constitutionally forbidden from providing the same services at religious private schools. This is a content-based, viewpoint-based regulation. A government benefit is provided to eligible persons except those who have chosen a religious-based education.

The Minnesota statutes and regulations at issue in *Peter v. Johnson* – derived from *Aguilar* – are explicit in this regard, making eligibility for a government benefit depend on the content and viewpoint of religious education. Special education services may be provided on the premises of private schools, as long as the school "is not church related, is not controlled by a church, and does not promote a religious belief." Minn. Stat. § 123.932,

subd. 9. It is the religious content of a school's program – the fact that the school "promote[s] a religious belief" – that supplies the basis for exclusion from special education benefits for children attending that school. It is the religious viewpoint of the school – the fact that it is "church-related" and thus religious in orientation and outlook – that disqualifies its students from receiving benefits to which they otherwise would be entitled. If a school promotes non-religious beliefs, or a secular philosophy, or some other system of values and principles (or none at all), parents may choose such a school for their child without forfeiting special education services. Only one perspective selected by parents for their children – religion – is singled-out as the basis for exclusion.

A family's choice of *religious* education is the choice of a particular expressive message. The parents of the children in *Aguilar* and the children in *Peter* have chosen religious schools for their children in whole or in part precisely because of the schools' religious messages and viewpoints and their desire to have such messages, values, and views transmitted to their children. In a very real sense, education is expression – of viewpoints, values, traditions – and the exercise by parents of the choice of religious education is the choice of a particular expressive viewpoint they wish conveyed to their children.

Clearly, discriminatory treatment by government, based upon the exercise of that expressive choice, is a presumptive violation of the Free Speech Clause. It is the "avowed religious perspective" (*Rosenberger*, 115 S.Ct. at 2518) of religious elementary and secondary schools, and the fact that they provide education "from a religious standpoint" (*Lamb's Chapel*, 113 S.Ct. at 2147) that triggers

the *Aguilar* rule. And clearly, the effect of that rule is discriminatory: Because of the religious content and viewpoint of the schools they attend (and that their parents have chosen), students attending religious schools are denied a benefit – *on-site* provision of education services, the method deemed most educationally appropriate to the students' situations.

We submit, therefore, that the rule of *Aguilar* is not only mistaken as a matter of Establishment Clause law, but *forbidden* as a matter of Free Speech law. Under this Court's cases, the rule of *Aguilar*, if adopted voluntarily as a legislative matter, would violate the Free Speech Clause. This, of course, is an important indicator that *Aguilar* is an unsound interpretation of the Establishment Clause. The First Amendment is not a self-contradiction. For *Aguilar* to be correct, however, the Court must both reaffirm an extreme and destructive interpretation of the Establishment Clause *and* hold that the Establishment Clause defeats the basic principles of Free Speech that would otherwise govern. The Court has consistently rejected that approach in the past, *see Rosenberger*, 115 S.Ct. at 2522 ("More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.") (collecting cases), and it should reject that approach here.

B. The Free Exercise Clause Forbids Discrimination in Access to a Government Program or Benefit on the Basis of Religious Belief, Exercise, Affiliation, or Status.

The Free Exercise Clause argument closely parallels the Free Speech Clause analysis. Just as the Free Speech Clause forbids government discrimination on the basis of religious expression, views, or ideas, the Free Exercise Clause forbids discrimination on the basis of religious belief, exercise, status, or affiliation.

Controversies concerning the Free Exercise Clause in recent years have focused on whether that clause may require special accommodation of religion, in the form of exemptions from laws of general applicability, where a facially neutral law or legal rule of general applicability uniquely burdens the free exercise of a particular religious practice. *See generally Employment Division v. Smith*, 494 U.S. 872 (1990). However, one principle remains at the agreed core of the Free Exercise Clause: Government must not discriminate against religion or religious exercise, in any manner, including within the context of government benefit programs. *Id.* at 877 ("The government may not . . . impose special disabilities on the basis of religious views or religious status."); *accord Church of Lukumi Babalu Aye*, 113 S.Ct. at 2226 (holding that "at a minimum," the Free Exercise Clause prohibits government discrimination against religion); *McDaniel v. Paty*, 435 U.S. 618, 639 (Brennan, J., concurring) ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits."); *Everson*, 330 U.S. at 16 (government "cannot exclude . . . the members of any . . . faith, because of their faith, or lack of it, from receiving the benefits of public

welfare legislation."); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (unconstitutional discrimination under Free Exercise Clause for government to exclude religious child care providers from eligibility to participate in Army child care program).

The rule of *Aguilar* violates this core Free Exercise Clause requirement of nondiscrimination on the basis of religion. *Aguilar* requires that unique disabilities be imposed on program beneficiaries – here, children eligible for remedial or special education services – because of their exercise of a religious choice and affiliation with a school that has a religious identity or mission. As members of this Court observed in *Aguilar*, the disability imposed is not an insignificant one: impoverished children are forced to receive remedial education away from their usual schools, in circumstances not conducive to the most educationally effective method of providing them, and many needy children will be deprived of these services altogether – on the basis of religion. *Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting) (noting that "the Court's decision is tragic" for more than 20,000 children in New York City alone, and for others who live in cities "where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school."). For many more, the strains and difficulties in traveling to a different school to receive remedial or special education assistance will lead parents to choose to have their children forgo the benefit altogether. *See, e.g., Kiryas Joel*, 114 S.Ct. at 2485.

The situations of *amici*, Sarah Peter and Aaron Westendorp, once again illustrate the point. The nature of the education benefits to which these children are entitled are

on-site paraprofessionals to assist them with their disabilities, so that they can remain in their regular classroom environments. If on-site services cannot be provided, Sarah and Aaron lose the benefit entirely. If they are enrolled in religious schools, they cannot have the benefit of on-site paraprofessionals. They have been compelled to abandon their chosen private religious schools, in order to receive the special education services they need, because of the rule of *Aguilar*.

Seeking an education under religious auspices or with a religious orientation is a constitutional right protected under the Free Exercise Clause and allied constitutional provisions. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *cf. Smith*, 494 U.S. at 881. It is well established that government may not require a private individual to forfeit Free Exercise Clause rights as a condition of eligibility for benefits or participation in a government program. *Thomas*, 450 U.S. at 716. The rule of *Aguilar*, however, produces exactly such a result: Families like the Peter family and the Westendorp family are put to a choice of forfeiting their rights to enroll their children in religious schools or forfeiting valuable special education benefits. The imposition of the penalty of loss of special education benefits, or denial of equal opportunity to benefit from such programs, as a consequence of choosing a religious school, is a clear violation of the Free Exercise Clause of the First Amendment.

CONCLUSION

For the forgoing reasons, *Aguilar v. Felton* should be overruled. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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